



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 29, 2005

Ms. Deborah F. Harrison
Assistant District Attorney
Collin County
210 South McDonald, Suite 324
McKinney, Texas 75069

OR2005-02625

Dear Ms. Harrison:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 220876.

The Collin County Criminal District Attorney's Office (the "district attorney's office") received a request for (1) any and all documents reviewed by the district attorney's office regarding a named individual and a specific incident, (2) any and all documents containing a determination by the district attorney's office regarding whether to file or refuse to file charges regarding the specified incident, and (3) any and all documents regarding a named individual. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.108, 552.111, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹

We note that the district attorney's office seeks to withhold an arrest warrant affidavit. Article 15.26 of the Code of Criminal Procedure states "[t]he arrest warrant, and any affidavit presented to the magistrate in support of the issuance of the warrant, is public information." Crim. Proc. Code art. 15.26. We have marked the arrest warrant affidavit that must be released pursuant to article 15.26.

¹You inform us that you do not have some of the requested information. We note that the Public Information Act does not require the district attorney's office to release information that did not exist when the request was received or create responsive information. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

We next note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides in part that

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(17). Information filed with a court is generally a matter of public record and may not be withheld from disclosure. *Id.*; *Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54 (Tex. 1992). Sections 552.103, 552.108, and 552.111 of the Government Code, which you raise, are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 177 (1977) (governmental body may waive statutory predecessor to section 552.108); 470 at 7 (1987) (statutory predecessor to section 552.111 was subject to waiver); 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, sections 552.103, 552.108, and 552.111 are not other law that makes information confidential for purposes of section 552.022. Therefore, the district attorney's office may not withhold the court documents that we have marked under these sections. However, section 552.130 of the Government Code is other law for purposes of section 552.022. Accordingly, we will consider the application of section 552.130 to the information subject to section 552.022(a)(17).

Section 552.130 of the Government Code provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state[.]

Normally, the submitted Texas driver's license number would be withheld under section 552.130. However, section 552.130 protects personal privacy interests. In this instance, the requestor is an attorney representing the individual to whom the driver's license number pertains. As such, the requestor has a special right of access to his client's information and such information may not be withheld from the requestor under section 552.130.² *See Gov't Code § 552.023(a)*; Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning herself).

²We note that because the requestor has a special right of access to this information in this instance, the district attorney's office must again seek a decision from this office if it receives another request for the same information from another requestor.

Some of the court-filed documents are medical records, access to which is governed by the Medical Practice Act ("MPA"), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides:

- (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.
- (b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.
- (c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982).

Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). The MPA permits disclosure of MPA records to the patient, a person authorized to act on the patient's behalf, or a person who has the written consent of the patient. Occ. Code §§ 159.003, .004, .005. Here, the requestor is a person authorized to act on behalf of the person whose medical records are at issue. Thus, the district attorney's office must release the submitted medical records, which we have marked, only in accordance with the MPA. Open Records Decision No. 598 (1991).

Next, we address your argument under section 552.108 of the Government Code for the information not subject to section 552.022(a)(17). This exception provides in part:

- (a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

...

(4) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) represents the mental impressions or legal reasoning of an attorney representing the state.

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:

...

(3) the internal record or notation:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) represents the mental impressions or legal reasoning of an attorney representing the state.

Gov't Code § 552.108(a)(4), (b)(3). A governmental body must reasonably explain how and why section 552.108 is applicable to the information that the governmental body seeks to withhold under this exception. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986).

In *Curry v. Walker*, 873 S.W.2d 379 (Tex. 1994), the Texas Supreme Court held that a request for a district attorney's "entire litigation file" was "too broad" and, quoting *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458 (Tex. 1993, orig. proceeding), held that "the decision as to what to include in [the file] necessarily reveals the attorney's thought processes concerning the prosecution or defense of the case." *Curry*, 873 S.W.2d at 380. The present request is for, among other things, any and all documents reviewed by the district attorney's office regarding a specific incident and individual. You state that this request is for the district attorney's office's "entire file including the prosecutor's work product." You further assert that all of the requested records consist of "the prosecution's files and they reflect the mental impressions and legal reasoning of the attorney representing the state." Based on your arguments and our review of the information in question, we find that section 552.108(a)(4) and (b)(3) are applicable in this instance.

We note that section 552.108 does not except from disclosure "basic information about an arrested person, an arrest, or a crime." Gov't Code § 552.108(c). Section 552.108(c) refers

to the basic front-page information held to be public in *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). The district attorney's office must release basic front-page information, including a detailed description of the offense, even if this information does not literally appear on the front page of an offense or arrest report. See *Houston Chronicle*, 531 S.W.2d at 186-188; Open Records Decision No. 127 at 3-4 (1976) (summarizing types of information deemed public by *Houston Chronicle*). Thus, the district attorney's office may withhold the rest of the submitted information under section 552.108(a)(4) and (b)(3).

In summary, the district attorney's office must release the arrest warrant affidavit under article 15.26 of the Code of Criminal Procedure and the court-filed documents we have marked under section 552.022(a)(17) of the Government Code. Medical records may only be released in accordance with the MPA. Except for the basic information that must be released under section 552.108(c), the district attorney's office may withhold the rest of the submitted information under section 552.108(a)(4) and (b)(3) of the Government Code. As we are able to make these determinations, we need not address your other arguments against disclosure except to note that basic information held to be public in *Houston Chronicle* is generally not excepted from public disclosure under section 552.103 of the Government Code. Open Records Decision No. 597 (1991).

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll

free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script that reads "Amanda Crawford".

Amanda Crawford
Assistant Attorney General
Open Records Division

AEC/seg

Ref: ID# 220876

Enc. Submitted documents

c: Mr. Bryan Gantt
McCraw & McCraw
1415 Harroun
McKinney, Texas 75069
(w/o enclosures)